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In the Supreme Court

of the United States

No. 486

OCTOBER TERM, 1961

BILL HERRON,

Appellant,

v.

PORTLAND STAGES INC., an Oregon corporation; GEORGE B. FOURIER and WILLIAM B. ROBINSON,

Appellees.

APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO AFFIRM

On Appeal from the Supreme Court of the State of Oregon.

Appearing herein
In propria persona:
BILL HERRON,
c/o Western Oil Co.,
10443 N. E. Klickitat,
Portland 20, Oregon,
Appellant.

VERGEER & SAMUELS,
CHARLES S. CROOKHAM,
1027 E. Burnside
Portland 14, Oregon,

KENNETH E. ROBERTS,
1001 Board of Trade Building,
Portland, Oregon,
Attorneys for Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-61

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MOTION TO DISMISS

Come now the appellees and respectfully move the Court for an Order dismissing the "Appeal from the Supreme Court of the State of Oregon" as filed herein by the appellant and as supported by the Jurisdictional Statement on file herein by the appellant.

The appellees show this Court that the appellant has brought this matter by "appeal" rather than by "writ

of certiorari," contrary to the provisions of 28 USC, Section 1257. An examination of the statute in question reveals that "appeal" is permitted only as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

In view of the foregoing, an examination of the claimed jurisdiction by the appellant is invited to pages 6 and 7 of the Jurisdictional Statement as filed by the appellant. In no instance is it shown nor claimed by the appellant that there is drawn in question the validity of a treaty or statute of the United States; nor is there any showing of the question of the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

It is therefore apparent that the Court lacks jurisdiction to entertain an appeal as has been brought herein by the appellant. Appellant's remedy, if any, lies solely through petition for writ of certiorari.

MOTION TO AFFIRM

Come now the appellees and move the Court for an order dismissing the appeal of the appellant on the ground and for the reason that no substantial question has been presented to this Court, either by way of an appeal or as a basis for a writ of certiorari.

Appellant's question as presented on page 6 of the "Jurisdictional Statement" is so vague and uncertain as to be a mere nullity. The purported provisions of the United States Constitution sought to be envoked by the appellant on page 6 of the Jurisdictional Statement likewise are without any coherent significance.

The Oregon State Constitutional provisions referred to on pages 6 and 7 of the "Jurisdictional Statement" do not, as set forth, present any Federal question. No claim is made that any of these provisions are in conflict with the United States Constitution or any United States statute or treaty, and it is difficult to determine what the appellant means by this inclusion.

The facts reveal that the appellant has had his day in court and has failed to take advantage of it. Appellant prefers to appear in propria persona for reasons known only to the appellant, but his obvious experience in legal matters clearly reveals that the only person at fault in any of these dismissals is the appellant himself.

The record as set forth in "Appendix A" of the "Jurisdictional Statement" indicates that the appellant filed his Complaint on September 9, 1959 (a law action sounding in assault and battery). A Motion to Strike was filed promptly after service of Summons and Complaint, and an Order entered thereafter upon oral argument. Subsequently, the appellant filed an Amended Complaint February 19, 1960, and within five days thereafter a Motion to Strike portions of the Amended Complaint was filed by the defendants. Thereafter, *and for a period of more than 15 months,* no activity was had on the file because of failure of the appellant to act.

As the records reveal, the Circuit Court, on its own motion, subsequently dismissed the case for want of prosecution. This Order was not entered until notice had been given the appellant and the attorneys for the appellees directing them to apear on the 2nd day of May, 1961, before the Circuit Court in Multnomah County, Oregon. The appellant did not appear and thereafter the Court entered the Order of Dismissal on its own motion for lack of prosecution. This was well within the inherent authority of the Circuit Court and certainly involves no federal question.

The Supreme Court of Oregon has held that this action is a matter of discretion with the trial court which will not be set aside in the absence of a showing of manifest abuse of discretion. *Bock* v. *Portland Gas & Coke Co.*, 202 Or 609, 277 P2d 758; *Horn* v. *California-Oregon Power Co*, 221 Or 328, 351 P2d 80.

The Order of Dismissal was signed by Circuit Judge Herbert M. Schwab on the 12th day of May and from

this order appellant took an appeal to the Supreme Court of the State of Oregon. No motion was filed by the appellant to seek a reconsideration of the Circuit Court action. The matters in connection with the commencement of the appeal were not filed until June 13, 1961, more than 30 days after the signing of the order by the Circuit Judge. The time for commencing appeal from such an order in the State of Oregon is 30 days. Oregon Revised Statutes provide as follows:

> ORS 19.026 "TIME FOR SERVICE AND FILING OF NOTICE OF APPEAL. (1) Except as provided in subsections (2) and (3) of this section, the notice of appeal shall be served and filed within 30 days after the entry of the judgment appealed from.
>
> (2) Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days from the earlier of the following dates:
>
> (a) The date of entry of the order disposing of the motion.
>
> (b) The date on which the motion is deemed denied, as provided in ORS 17.615.
>
> (3) Any other party desiring to appeal may serve and file his notice of appeal within 10 days after the expiration of the time allowed by subsections (1) and (2) of this section.
>
> (4) When more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal. [1959 c. 558 §4]"

After the filing of the Notice of Appeal which indicated that the appellant was appealing from the Judg-

ment of May 12th, 1951, and pursuant to the rules of the Oregon State Supreme Court, a Motion to Dismiss the appeal for lack of jurisdiction was filed, together with a brief in support thereof. At all times, copies of all pleadings, notices, motions and briefs were served upon the appellant personally by mail at his address, 10443 N. E. Klickitat, Portland 20, Oregon. Because the appellant is not an attorney, it was deemed proper to effect mailing by certified mail with a return receipt requested (see affidavit of Charles S. Crookham included as part of the transcript submitted by the Clerk of the Supreme Court of the State of Oregon).

Subsequent to the filing of the Motion to Dismiss the appeal in the Oregon Supreme Court, the Court considered the matter on the record and without oral argument entered an order dismissing the appeal.

Nowhere is there any suggestion of any deprivation of right on the part of the appellant; rather the record is complete as showing a failure on the part of the appellant to act even reasonably promptly.

A lapse of time from February, 1960 until the Court's own motion of May of 1961 is unexplained and unexplainable. The appellees-defendants were certainly under no duty to act other than passively. *Bock* v. *Portland Gas & Coke Co.*, supra.

It is difficult to envision that any federally protected right has been infringed upon or violated.

Appellant did not seek a rehearing in the Supreme Court of the State of Oregon (see Rule 11, Rules of Procedure, Oregon Supreme Court, 222 Or [25]), but

commenced an appeal to this Court, complaining that he was denied opportunity to present this matter before a jury.

Any failure to present this matter to the trial court was occasioned solely by the appellant's own failure to act within any reasonable time.

The appellees thus feel that no appeal lies herein, nor that any Federal question has been invoked by appellant.

Respectfully submitted,

VERGEER & SAMUELS,
CHARLES S. CROOKHAM,
KENNETH E. ROBERTS,
Attorneys for Appellees.